

IN THE MATTER OF WHITE  
STALLION ENERGY CENTER LLC  
APPLICATION FOR AIR QUALITY  
PERMIT NOS. 86088, HAP28, PAL26  
AND PSD-TX-1160

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
TCEQ DOCKET NO. 2009-0283-AIR;  
SOAH DOCKET NO. 582-09-3008

**WHITE STALLION ENERGY CENTER LLC'S BRIEF CONCERNING PROCEDURE  
FOR ADDRESSING "NEW EVIDENCE" REMAND**

TO THE HONORABLE COMMISSIONERS:

TCEQ issued a final Order granting the application by White Stallion Energy Center LLC ("White Stallion") for Air Quality Permit Nos. 86088, HAP28, PAL26 and PSD-TX-1160 (the "Air Permit") (TCEQ Order, Oct. 19, 2010; Air Permit, Dec. 16, 2010). In response to a motion filed by Environmental Defense Fund, Inc. ("EDF") in the subsequent judicial review proceedings, the Honorable Judge Lora J. Livingston issued an "Order of Remand for Additional Evidence pursuant to Tex. Gov't Code § 2001.175(c)" ("Remand Order"). *Environmental Defense Fund, Inc. v. Tex. Comm'n on Envtl. Quality*, No. D-1-GN-11-000011 (201st Dist. Ct., Travis County, Tex. order issued June 20, 2011)(copy provided as Ex. A). The "new evidence" identified by EDF is a site plan submitted by White Stallion to the U.S. Army Corps of Engineers on October 25, 2010, in the context of its application for a Clean Water Act § 404 permit (the "Wetlands Mitigation Site Plan").

Under that Site Plan, some material handling operations would be moved away from identified wetlands, but all other emission points remain as represented in the Air Permit application. A copy of the Wetlands Mitigation Site Plan may be found as an attachment to a "Motion to Reopen the Record, Motion to Extend Time for Filing a Supplemental Motion for Rehearing, and Motion to

Extend the Time for Consideration of Motions for Rehearing,” which EDF filed in this docket after the Commission issued its October 19, 2010 Order granting the Air Permit, but while that Order was still within the rehearing phase. The Court, on EDF’s Motion, decided that the Commission should have an(other) opportunity to determine whether the Wetlands Mitigation Site Plan would affect the Commission’s Order on the Air Permit, which Order remains pending before the Court for judicial review.

The General Counsel has requested briefs “on the limited issues relating to the procedural aspects and the scope of the remand to comply with the [Remand Order].” White Stallion respectfully suggests that the Commission, through its General Counsel,<sup>1</sup> establish the following procedure pursuant to its general grant of authority to hold hearings under Texas Water Code § 5.102(a) (power to do anything “necessary and convenient”) & (b) (“may call and hold hearings”):

- 1) EDF, as the proponent of the remand, would be required within 20 days of the procedural order to proffer the “new evidence” remanded by the District Court to the Commission as an attachment to a Motion for Amended Order. That Motion should identify any basis for change(s) to the Order from which it appeals that would be appropriate in light of the specifically remanded “new evidence.”
- 2) Any party may respond to such Motion for Amended Order within 30 days after the General Counsel issues this procedural order.
- 3) Replies to response(s) would be allowed if filed within 40 days of the procedural order.
- 4) The Commission would set the Motion(s) for Amended Order for hearing at an Agenda meeting, at which oral argument may be allowed. If the Commission determines, based on the papers and argument, that the remanded “new evidence” would not change any findings or conclusions, the Commission could deny the Motion(s), determine that no other action is warranted, and file a letter with the Court, which also transmits the “new evidence” as part of the record taken in the case. If the Commission instead determines that its decision could be affected by the “new evidence,” it could then direct further proceedings appropriate to its views on the potential scope of any such changes.

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<sup>1</sup> This step may be handled by the General Counsel under authority delegated by TCEQ Resolution entered in Docket No. 2009-0059-RES.

As elaborated below, this procedure complies with the Remand Order and Tex. Gov't Code § 2001.175(c), is within the Commission's power under applicable statutes and rules, and comports with the Commission's consistently stated interpretations of the relevant statutes it is charged with administering.

**I. THE COURT'S REMAND ORDER ALLOWS, BUT DOES NOT COMPEL—  
INDEED COULD NOT COMPEL—THE COMMISSION TO CHANGE ITS  
FINDINGS AND CONCLUSIONS.**

The Commission's Order issuing the Air Permit remains valid and has not been subject to any finding of error by any tribunal. *See, e.g., Ford Motor Co. v Butnaru*, 157 S.W.3d 142, 148 (Tex. App.—Austin 2005, no pet.) (board's final order "binding until a court sets it aside"); *see also* TEX. GOV'T CODE § 2001.175(c) ("agency *may* change its findings" in response to new evidence (emphasis added)); TEX. GOV'T CODE § 2001.174 (enumerating limited actions a reviewing court can take with respect to an agency's decision); TEX. CIV. PRAC. REMEDIES CODE §§ 6.001 & 52.001 (district court judgment on agency action superseded throughout judicial appeal process if defended by the agency). Accordingly, TCEQ need not touch its own final Order to comply with the District Court's Remand Order.

Nor is the Commission compelled to consider any "evidence" other than the "evidence" that EDF presented to the District Court as the basis for its remand motion. Indeed, it cannot be so compelled: The remand is based on Tex. Gov't Code § 2001.175(c), a procedural tool by which a reviewing court may provide to an agency the *opportunity* but not the obligation to reconsider its decision in light of new, previously unavailable evidence that might change that decision while judicial review remains pending. *See* TEX. GOV'T CODE § 2001.1775 (otherwise generally prohibiting any agency-initiated change in an order under judicial review). Section 2001.175(c) authorizes an order to (1) take the "additional evidence" presented by a party, not to take any other evidence or

particular action in response to it, and (2) to inform the Court whether the “additional evidence” changes the Commission’s previous decision.

Even when there *is* a finding of error on the merits disposition of a case, which of course has not happened here, courts cannot dictate how the agency must correct its error. *Marrs v. Railroad Comm’n*, 177 S.W.2d 941, 950 (Tex. 1944) (“would amount to a usurpation of the Commission’s power by the court, for the court to undertake to prescribe the terms of [an order]”); *Sterling Truck Corp. v. Motor Vehicle Bd. of Tex.*, 255 S.W.3d 368, 380 (Tex. App.—Austin 2008, pet. denied) (rendering judgment on the form of relief after finding of error “would be an unwarranted intrusion on the agency’s authority”). The Third Court of Appeals repeatedly and consistently “reject[s] trial court attempts to control the agency’s proceeding on issues reversed and remanded to the agency.” *Freightliner Corp. v. Motor Vehicle Bd.*, 255 SW 3d 356, 362 (Tex. App.—Austin 2008, pet. denied) (citing *Butnam*, 157 S.W.3d at 149 (trial court erred by requiring agency to conduct investigation on remand)); *Employees’ Retirement Sys. of Tex. v. McKillip*, 956 S.W.2d 795, 802 (Tex. App.—Austin 1997, no pet.) (district court erred by directing agency to adopt proposal for decision); *Pantera Energy Co. v. R.R. Comm’n of Tex.*, 150 S.W.3d 466, 474-75 n. 9 (Tex. App.—Austin 2004, no pet.) (affirming trial court’s dismissal of appeal as moot and rejecting request to render decision agency “should have” made)).

TCEQ has specifically been ordered to “tak[e] additional evidence on”:

- (1) the October 25, 2010 site plan submitted by WSEC to the U.S. Army Corps of Engineers, and
- (2) its **impacts on WSEC’s TCEQ air permit application under applicable law.** Remand Order at ¶1 (emphasis added).

Further, “the additional evidence admitted in the re-opened TCEQ/SOAH proceedings and any changes in findings, new findings, or decisions shall be filed by TCEQ with this Court.” Remand

Order at ¶3.<sup>2</sup> The judicial review proceeding was abated “pending the taking of such additional evidence and pending TCEQ’s decision whether to change its findings and decision by reason of the additional evidence.” Remand Order ¶2. The Court did not impose any other conditions on the remand.

Importantly for the scope of the Commission’s response to the Remand Order, the Court did not purport to make any findings as to the “applicable law.” This leaves the Commission in position to either (1) further explain for the benefit of the reviewing court how, “under applicable law,” site plans in other regulatory proceedings are irrelevant to a decision on the Air Permit application as filed by the applicant, or (2) instead now choose to reopen its permit decisions based on ongoing evolution in project design. The Commission’s clarification of its application of the law it is charged with implementing gives full effect to the Remand Order while respecting the agency’s role and authority under the law.

## **II. THE RECOMMENDED PROCESS ALLOWS THE COMMISSION TO MORE DEFINITELY ANSWER THE THRESHOLD QUESTION OF WHETHER IT CONSIDERS OTHER SITE PLANS RELEVANT TO ITS DECISION ON THE PLAN SUBMITTED TO IT FOR EVALUATION.**

At the outset of the judicial review process, the Court was faced with two opposing views of the law and of how TCEQ actually applied it in the course of the underlying administrative proceeding. EDF asserted that the Administrative Law Judges and the Commission were misled by a single line of isolated testimony taken out of context, and granted the permit only on the belief that the site plan would not change from the one included in the air permit application. *Id.* ¶7, 10. EDF further asserted that the evidence in the record of the two other iterations of the project site

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<sup>2</sup> It is well within TCEQ’s discretion to “take” the “additional evidence,” and not to delegate that task to the State Office of Administrative Hearings (“SOAH”). See TEX. WATER CODE §§ 5.102(b) (“*may* receive evidence”) & 5.311 (Commission “*may* delegate” to SOAH) (emphases added). The Court did not order that TCEQ remand this matter to SOAH, only that it could. See Remand Order ¶1, 3. In fact, EDF specifically asked the Court to mandate a hearing before SOAH, EDF Motion for Remand Under APA 2001.175(c) ¶23, yet the Remand Order did not grant that relief.

plan filed under other regulatory programs did not sway the Commission, but the Wetlands Mitigation Site Plan could if TCEQ were to have that site plan squarely before it. *See id.* ¶6, 11, 13.

White Stallion *and the Commission* asserted that the Commission issued the Air Permit on the basis of, and limited to the representations in, the Air Permit application. White Stallion Response to EDF Motion, p. 5; TCEQ Response to EDF Motion, p. 6. The Commission fully understood that the site plan likely would change, and yet found evidence of other site plans irrelevant to its decision, because the Commission handles the evolution of large-scale development projects through restrictions in permit terms, leaving it to the applicant to reconcile its various permits through appropriate procedures under 30 TEX. ADMIN. CODE § 116.116, if necessary. White Stallion Response, p. 9-10; TCEQ Response, p. 6-7; TCEQ Petition for Writ of Mandamus, *In re White Stallion Energy Center LLC*, No. 11-0622 (Tex. filed Aug. 10, 2011), p. 9. Faced with what is fundamentally an issue for merits briefing, but also two opposing views of how TCEQ actually applied the law in this particular case, Judge Livingston ordered the Commission to consider the effects of the Wetlands Mitigation Site Plan on the Air Permit application *under applicable law*, without any statement as to what that law is. Remand Order ¶1.

Pursuant to the Remand Order, TCEQ must “take” the “new evidence” remanded by the District Court into the record, even if it then finds that such “evidence” has no bearing on its prior decision to issue the Air Permit. The Commission can “take” that “new evidence” through a proffer by written submission, with its relevance argued by motion to amend the Commission’s original Order. *See* TEX. WATER CODE § 5.102. If the Commission finds the Wetlands Mitigation Site Plan could have no effect on the Order granting White Stallion’s Air Permit, no further evidence must be “taken.” EDF’s Motion to Amend the Order, by which it would proffer the “additional evidence,” and then its opportunity to reply to responses, provide it with a full opportunity to persuade the Commission as to the significance of the Wetlands Mitigation Site Plan in the context of WSEC’s

Air Permit application and the Commission Order granting it, from which EDF appeals. White Stallion's opportunity to respond provides it with the opportunity to object on the record to the relevance of that proffered "new evidence." The other parties also have an opportunity to present argument.

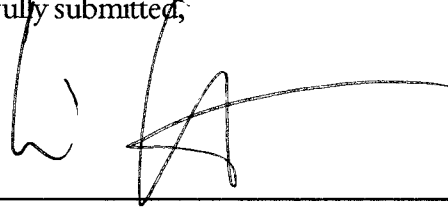
If the Commission's deliberations confirm the views about "applicable law" that it has expressed to the District Court through counsel (and to Texas's appellate courts in subsequent mandamus proceedings), the Commission can explain those views in the letter by which it transmits the updated record to the District Court, which would include not only the "new evidence," but the motions, responses, replies, and transcript of the hearing on the motion(s). Such clarification would put in the administrative record a judicially reviewable explanation of the Commission's application of the governing law in the decision under review. If, after deliberations, the Commission instead finds that resolution of the issue depends on the extent of variation, etc., then it may order appropriate further proceedings.

### III. CONCLUSION

The purpose of the Remand Order and the statute under which it was issued is for the Commission to decide "whether to change its findings and decision by reason of the additional evidence." Remand Order ¶2; TEX. GOV'T CODE § 2001.175(c). The recommended procedure provides a reasonable and appropriate means to take the "additional evidence" that the Court wanted squarely before the Commission in full compliance with the Remand Order. It also provides the Commission with the opportunity to either (1) further explain for the benefit of the reviewing court why site plans in other regulatory proceedings are irrelevant to a decision on the Air Permit application as filed by the applicant, why the inevitability of project design evolution is properly accommodated by permit conditions and other rules, and why to conclude otherwise would be

contrary to sound policy, as it did through counsel in later proceedings, or (2) instead now choose to reopen its permit decisions based on ongoing evolution in project design.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Eric Groten', written over a horizontal line.

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CENTER LLC



## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 23rd day of January, 2012.

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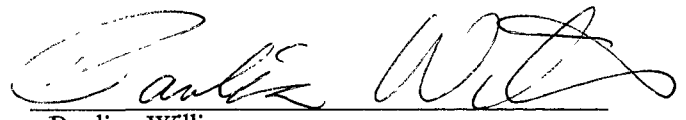
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# Exhibit A

CAUSE NO. D-1-GN-11-000011

ENVIRONMENTAL DEFENSE	§	IN THE DISTRICT COURT OF
FUND, INC.,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
	§	
DEFENDANT	§	201 <sup>st</sup> JUDICIAL DISTRICT

## ORDER

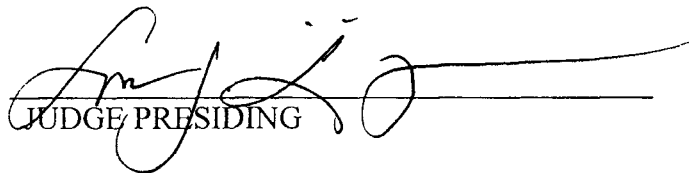
On May 24, 2011, the Court heard Plaintiff Environmental Defense Fund, Inc. (“EDF”)’s Motion for Remand under Texas Government Code § 2001.175(c). EDF, Defendant Texas Commission on Environmental Quality (“TCEQ”) and Intervenor White Stallion Energy Center, LLC (“WSEC”) appeared through their respective counsel. The Court has considered the pleadings, the evidence and the arguments of and authorities cited by counsel. The Court is satisfied that the additional evidence is material and there are good reasons why it was not presented in the proceeding before the State Office of Administrative Hearings (“SOAH”) (SOAH Docket No. 582-09-3008) and the TCEQ (TCEQ Docket No. 2009-0283-AIR) and that unless the Court grants this motion, the public will not be afforded meaningful participation in the permit application review process. The Court therefore GRANTS the motion as follows.

1. It is ORDERED that, pursuant to Texas Government Code §2001.175(c), this matter be remanded for the taking of additional evidence on the October 25, 2010 site plan submitted by WSEC to the U.S. Army Corps of Engineers ("Site Plan 4") and on its impacts on WSEC's TCEQ air permit application under applicable law.

2. It is FURTHER ORDERED that this appeal shall be abated pending the taking of such additional evidence and pending TCEQ's decision whether to change its findings and decision by reason of the additional evidence as provided under Tex. Gov't Code § 2001.175(c).

3. It is FURTHER ORDERED that, pursuant to Tex. Gov't Code § 2001.175(c), the additional evidence admitted in the re-opened TCEQ/SOAH proceedings and any changes in findings, new findings, or decisions shall be filed by TCEQ with this Court.

SIGNED this 20<sup>th</sup> day of JUNE, 2011.

  
JUDGE PRESIDING